Published on *The National Law Review* https://natlawreview.com

Are Your Settlement and Severance Agreements Inviting Litigation Rather Than Preventing It?

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Employers in all industries utilize **severance and settlement agreements** to obtain finality when ending an employment relationship or resolving an employment-related dispute. Employers frequently use standardized severance agreements, sometimes based upon templates that were drafted years ago. In a string of recent **Equal Employment Opportunity Commission (EEOC)** enforcement actions, the Agency has challenged provisions that it considers overly broad, unenforceable and contrary to public policy. The EEOC's willingness to dedicate its resources to challenge such agreements highlights the need for employers to proceed with care, particularly when relying on templates that have not undergone recent legal review.

As part of its aggressive stance on severance agreements, the EEOC has focused on two types of provisions: (1) the covenant-not-to-sue, which is a requirement separate from the general release of claims, under which the employee affirmatively promises not to file a complaint or bring an action based upon any of the claims released under the agreement; and (2) non-disparagement clauses and similar provisions that limit the employee's ability to speak about matters relating to his or her employment. The EEOC claims covenants-not-to-sue and broad non-disparagement clauses interfere with employees' right to file discrimination charges or provide information to the EEOC and therefore are unlawful.

EEOC v. CVS Pharmacy, Inc., filed this month, provides the most recent example of the EEOC's enforcement efforts. CVS Pharmacy's severance agreement contained covenant not-to-sue and non-disparagement clauses which the EEOC characterized as "overly broad, misleading and unenforceable." What should trouble employers is that these provisions are currently used by many employers as part of their standard practices. Even more, CVS Pharmacy included a disclaimer to the covenant not-to-sue that stated nothing in the agreement interfered with employees' right to participate in proceedings with the EEOC or other agencies and to cooperate with such agencies. This disclaimer was not sufficient to save CVS from the EEOC lawsuit.

The *CVS Pharmacy* case came on the heels of ***EEOC v. Baker & Taylor, Inc.*** where the Agency took aim at a severance agreement that contained a covenant-not-to-sue and related promise by employees not to speak negatively of their terminations. The case was ultimately resolved through a

consent decree that required, among other things, that the employer (1) cease using the challenged agreement, (2) include a broad, prominent disclaimer in all subsequent agreements regarding employees' ongoing right to file charges, and (3) provide notice to each employee who had signed the severance agreement that s/he retained the right to file a charge.

It remains to be seen whether the EEOC's enforcement posture will survive judicial review. Some courts have rejected the EEOC's arguments, including the argument that merely including a potentially unenforceable provision in a severance agreement constitutes "facial retaliation."

However, the Agency's consistent opposition to covenants-not-to-sue, its broadening criticism of non-disparagement clauses and other provisions limiting communication, and its willingness to utilize its enforcement authority to validate its view, means an employer negotiating a private agreement should draft with care. Special attention should be paid to boilerplate severance agreements that might draw the attention of the Agency, even if ordinary disclaimers are in place. Employers may wish to consult with legal counsel to ensure that their severance and settlement documents are drafted to serve intended goals.

National Law Review, Volume IV, Number 55